95-1584

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

CSX TRANSPORTATION, INC.,

Petitioner

v.

TRACI L. CASTRO

On Petition For Writ Of Certiorari
To The Court Of Special Appeals Of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Employers' Liability Act imposes on railroads a duty to inspect the tops of hazardous material tank cars at interchange absent notice of a top-side defect.

2. Whether Section 205 of the Federal Railroad Safety Act, 49 U.S.C. 20106, preempts application of a state court's interpretation of the Federal Employers' Liability Act requiring railroads to inspect the tops of tank cars at interchange absent notice of a top-side defect.

PARTIES TO THE PROCEEDING

Parties

CSX Transportation, Inc.

Traci L. Castro

Parent Corporations

CSX Corporation

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No.

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October Term, 1995

CSX TRANSPORTATION, INC.,

Petitioner

v.

TRACI L. CASTRO

Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner CSX Transportation, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Special Appeals of Maryland entered in this action on September 26, 1995.

OPINIONS BELOW

The opinion of the Circuit Court for Baltimore City, Maryland, dated October 5, 1994, granting the Petitioner's Motion for Summary Judgment; the opinion of the Court of Special Appeals of Maryland dated September 26, 1995, reversing the trial court's

ruling; and the Order of the Court of Appeals of Maryland dated January 18, 1996 denying the Petition for Certiorari are reprinted in the Appendix hereto.

BASIS FOR JURISDICTION

On January 18, 1996, the Court of Appeals of Maryland denied Petitioner's Petition for Writ of Certiorari to review the decision of the Court of Special Appeals of Maryland. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The United States Constitution states in Article VI, Clause 2:

> This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.

Section 101 of the Federal Railroad Safety Act, as amended at 49 U.S.C. § 20101, provides:

> The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

Section 202 of the Federal Railroad Safety Act, as amended at 49 U.S.C. § 20103, provides:

> The Secretary of Transportation . . . shall prescribe regulations and issue orders for every area of railroad safety . . . .

Section 205 of the Federal Railroad Safety Act, as amended at 49 U.S.C. § 20106, provides:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or

> continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 C.F.R. part 173.31 provides:

> When tanks are loaded and prior to shipping, the shipper must determine . . . that the tank, safety appurtenances and fittings are in proper condition for the safe transportation of the lading . . . . All closures of openings in tank cars and of their protective housings must be properly secured . . . .

49 C.F.R. part 173.31(d)(2) (effective July 1, 1996), provides:

> [T]he lack of securement of any closure to a tool-tight condition, detected at any point, will establish a rebuttable presumption that a proper inspection was not performed by the offeror of the car.

STATEMENT OF THE CASE

A. Procedural Background

The issue presented in this Petition arises from an accident which occurred when sulfuric acid sprayed from the top of a railroad tank car onto Respondent Traci L. Castro at Petitioner's Baltimore, Maryland transport yard.

Pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, Castro filed a personal injury action in the Circuit Court for Baltimore City against Petitioner CSX Transportation, Inc. (hereinafter

"CSXT") alleging, insofar as pertinent to this petition, negligence in CSXT's failure to inspect the top of the offending tank car at interchange. CSXT timely moved for summary judgment on this and all other claims, which the trial court granted in a memorandum opinion dated October 5, 1994. (*See* Appendix B, at 13a).[1]

The trial court held that the FELA did not require CSXT to conduct a top-side inspection of tank cars for evidence of leaks in the absence of suspicious circumstances. It declined, however, to hold that the U.S. Department of Transportation Hazardous Materials Regulations placed such a duty solely upon the offeror-shipper of the tank car. (Appendix B at 19a-20a).

On September 26, 1996, a panel of the Court of Special Appeals of Maryland reversed the trial court's grant of summary judgment in an unreported opinion. (Appendix A, at 1a). The panel rejected the trial court's conclusion that, as a matter of law, ground-level inspections of tank cars containing sulfuric acid are reasonable. It failed to address CSXT's argument that the HAZMAT regulations confined the duty of top-side inspection to rail shippers.

CSXT petitioned for review in the Court of Appeals of Maryland, reasserting its positions below and further arguing that application of the lower appellate

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[1] CSXT asserted third party claims against both the owner of the offending tank car and the shipper/offeror of the acid contained in it. These claims were stayed by order of October 14, 1994 pending Castro's appeal.

court's holding amounted to state regulation preempted by the Federal Railroad Safety Act. The Court of Appeals denied CSXT's petition for review on January 18, 1996. The instant Petition followed.

B. Statement of Facts

One day prior to Respondent Castro's injury, CSXT received the subject tank cars at a railroad interchange in Philadelphia, Pennsylvania for transport to Baltimore. CSXT visually inspected the cars in Philadelphia for leakage and found none; CSXT did not inspect the tops of the cars.

Castro was part of a three person train crew assigned to switch the tank cars from CSXT's Baltimore transport facility onto side tracks that serviced a local chemical company, the cars' ultimate destination. She and her crew visually inspected the tank cars for leakage and other defects and found none. Again, no top-side inspection was conducted. Shortly thereafter, during the normal switching process, sulfuric acid suddenly sprayed from the top of one of the tank cars onto Castro.

Subsequent investigation revealed that a deteriorated and cracked manway cover gasket in the dome of the tank car caused the chemical release. Castro offered opinion testimony that a top-side inspection at the Philadelphia interchange would have alerted CSXT to this defect, and that a ground level inspection could only have detected a defect if product had leaked from the tank dome in sufficient quantities to run down the sides of the cars, thus being visible to railroad crews. Castro presented no evidence that a

leak of such magnitude existed--either in the offending tank car or any other--prior to her injury.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH FEDERAL LAW AND FEDERAL REGULATION, THREATENS RAILROAD EMPLOYEE SAFETY, AND POSES AN UNDUE BURDEN ON INTERSTATE COMMERCE

The decision below, a result-oriented holding based on Castro's *ad hoc* litigation position, flies in the face of settled federal case law and explicit federal regulation, all of which have exempted railroads from any duty to conduct "top-side" inspections of rail cars at interchange or elsewhere. Even more disturbing is that under the guise of promoting railroad safety, the panel's decision actually increases the risk of injury to hundreds of railroad workers, both in Maryland and beyond her borders, who must now ascend to and inspect the top of every tank car destined to pass through the state.[2] Freight transportation must as a

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[2] Particularly frustrating was the panel's disingenuous disclaimer that its decision did not charge railroads with "an absolute duty to conduct a topside inspection" when that is exactly what it did. In allowing the case to proceed, the panel concluded that there was "significant" evidence that a *reasonable* inspection by CSXT would have revealed the defect. (Appendix A, at 6a). However, it was undisputed that nothing short of a top-side inspection would possibly have alerted CSXT to the defective gasket. (Both of Castro's experts opined that ground level inspections were

consequence be halted long enough for carriers to complete these inspections. Such practices may well increase rail transport costs and will certainly hinder the efficient flow of goods between the states.

Not appreciated by the panel is that the additional costs imposed by its decision, which come at the expense of railroads, their employees, and consumers, are not offset by any comparable benefit. Explicit federal regulation already requires that a thorough and detailed inspection of the tops of tank cars and their closure mechanisms be conducted by the car's offeror (shipper). Thus, freight transportation by rail is not made any safer by the panel's decision.

This Court has recognized that a railroad's duty to inspect the cars it hauls is limited to an ordinary inspection aimed at detecting visible and obvious defects. *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 8 (1963). Since then, the United States Court of Appeals for the Fourth Circuit has determined that the duty recognized by this Court in *Shenker* does not obligate railroads to inspect a rail car's manner of loading. *Millers Mut. Ins. Assoc. of Illinois v. Southern Ry. Corp.*, 483 F. 2d 1044 (4th Cir. 1973); *Casella v. Norfolk & Western Ry. Co.*, 381 F. 2d 473 (4th Cir. 1967).

The fundamental purpose of rail car inspection by a railroad has always been to confirm the car's "trackworthiness" for transport. The Federal Railroad

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inadequate to detect a gasket defect unless massive leaks existed, App. D, at 33a; Appx. E, at 39a. No such leaks existed prior to her injury). Clearly therefore, "reasonable" means "top-side" under the panel's rationale, and now nothing short of such an inspection can insulate a railroad from liability.

Administration (FRA) has acknowledged as much in commenting that a railroad's regulatory duty to inspect a tank car, per 49 C.F.R. part 174.9, is "aimed at detecting obvious leaks and defects in the *running gear* of the vehicle." *See* 60 Fed. Reg. 49065 (1995) (emphasis added). As for inspecting the tops of tank cars and their closure mechanisms, Federal regulation places that duty unequivocally upon the tank car *shipper*. *See* 49 C.F.R. part 173.31(b)(3).

In fact, the FRA's 1991 Hazardous Materials Enforcement Manual explicitly states that where problems with tank car leakage "could not be observed *from the ground,*"--which is precisely the posture of this case --the "culpable party is nearly always the car's offeror"--not the railroad. (*See* Appendix F, at 41a). Moreover, the newly adopted DOT regulations, to be legally binding as of July 1 of this year, now place *on the offeror* a rebuttable presumption of improper inspection if a tank car closure is found to be defective. *See* 60 Fed. Reg. 49,065 (1995) (to be codified at 49 C.F.R. part 173(d)(2)).

This Court's guidance is needed to clarify the scope of a railroad's duty to inspect under *Shenker*, *Cassella*, and *Millers*, in light of the above mentioned regulations and in light of the stated position of the Federal Railroad Administration. Short of a definitive decision, railroads operating in Maryland and perhaps other states will be forced to engage in unnecessary defensive "reinspections" of tank cars, thereby increasing costs without realizing any accompanying benefit.

II.

THE DECISION BELOW UNDERMINES A UNIFORM FEDERAL SCHEME TO IMPROVE HAZARDOUS MATERIALS TRANSPORTATION

The decision below, premised on the panel's erroneous interpretation of federal decisions and regulations, threatens a nationally uniform regulatory structure that has systematically improved hazardous materials transportation. By permitting a state jury to hold Petitioner liable for failing to perform an inspection far broader than that which the regulations and case law require, the decision below sanctions the same *ad hoc*, dual system of federal-state rail safety regulation that Congress explicitly sought to eliminate through the FRSA. At stake is the vitality of a regulatory approach to hazardous material transportation safety, preemptive of state regulation by express congressional design, that directly affects interstate commerce and the safe operation of the nation's railroads.

In *CSX Transp., Inc. v. Easterwood*, ___ U.S.____, 113 S. Ct. 1732 (1993), this Court ruled that the FRSA preempts state common law tort decisions involving railroad safety issues regulated by the federal government. This case is no different; in fact, the state action here is more intrusive on federal powers. In its interpretation of the FELA, Maryland has created its own version of FELA common law--a version that casts off years of settled federal case law and places on

railroads safety requirements far broader than those required by the federal government.[3]

Federal preemption by the Federal Railroad Safety Act is unquestioned. *CSX Transp., Inc. v. Easterwood, supra.* Vigorous debate over the Act left clear that Congress intended for "virtually complete federal preemption in the area of railroad safety laws." *CSX Transp., Inc. v. Public Utils. Comm'n of Ohio,* 701 F. Supp 608, 613 (S.D. Ohio 1988), *aff'd,* 901 F. 2d 497 (6th Cir. 1990), *cert. den.* 111 S. Ct. 781 (1991). The FRSA's aim was to preclude a multiplicity of varying and conflicting state and local rail safety regulations. *See* S. Rep. No. 1192, 93d Cong., 2nd Sess. 37 (1974). Hence, once the Secretary of Transportation regulates a particular area of rail safety, state regulation is expressly preempted in that area. 49 U.S.C. § 20106.

The Secretary has in fact promulgated regulations which define the scope of one's duty to inspect a tank car. Top-side closure inspections are required of the car's offeror or shipper, *see* 49 C.F.R. part 173.32(b)(3); railroads need only check for obvious leaks and defects in the running gear of the vehicle. *See* FRA Comments, at 60 Fed. Reg. 49065 (1995). Consequently, Maryland cannot, as it has done, adopt a more stringent tank car inspection requirement except under narrow

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[3] Compounding the lower court's error in interpretation is the fact that its decision would allow Castro's expert witnesses to render the same erroneous conclusory legal opinions at trial. Affidavits they submitted are riddled with personal opinions concerning the scope of a railroad's duty to inspect and the applicablity and effects of D.O.T. regulations. (*See* Appendix D, at 30a; Appendix E, at 35a). This Court, not an expert witness, determines the meaning of federal law.

circumstances not present in this case. *See* 49 U.S.C. § 20106.

The appeals panel disregarded the Secretary's affirmative regulatory action in allowing Castro to proceed against CSXT on her claim. In so doing, the panel has provided a conduit through which Maryland juries may now regularly and repeatedly overstep the bounds of their power and intrude on the powers of Congress. The panel's decision challenges the supremacy of Congressional legislation designed expressly to avoid rail safety regulation through a hodgepodge of different rules, regulations, or jury verdicts ostensibly designed to reduce hazards, which "do not, in the larger picture, reduce hazards at all, but rather may create them." *City of Covington, Ky. Chesapeake & Ohio Ry. Co.*, 708 F. Supp. 806, 808 (E.D. Ky. 1989).

Guidance from this Court is needed to determine whether and to what extent individual states, through their own interpretations of federal law, may hold railroads to higher safety standards than mandated by the Federal Government. Absent judicial direction on the issue, states are free to weave a tapestry of varying and conflicting railroad safety standards that circumvents the preemptive effect of the Federal Railroad Safety Act.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Court of Special Appeals of Maryland in this case.

This second day of April, 1996.

Respectfully submitted,

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APPENDICES

Appendix A

Opinion of the Court of Special Appeals of Maryland

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1867

September Term, 1994

TRACI L. CASTRO

v.

CSX TRANSPORTATION, INC.

Wenner,
Davis,
Hollander,

JJ.

Per Curiam

Filed: September 26, 1995

Appellant, Traci L. Castro, appeals from the judgment of the Circuit Court for Baltimore City, granting summary judgment in favor of appellee, CSX Transportation, Inc. On appeal, she raises several questions, all dealing with the issue of whether summary judgment was properly granted. Finding that summary judgment was not properly granted, we will reverse the judgment of the circuit court.

Facts

We begin by noting that there are no disputed material facts. The unfortunate events which led to this appeal began in Quebec, Canada where tank cars containing sulfuric acid were transported by Consolidated Rail Corp ("Conrail") to an interchange in Philadelphia, Pennsylvania. There, the tank cars were transferred to appellee, CSX Transportation, Inc. ("CSX") for their final journey to Baltimore, Maryland.

At about 1:00 a.m., on 26 August 1993, appellant was working as a trainee-brakeman for CSX at its Curtis Bay Yard facility in Baltimore. Appellant's duties included conducting a ground-level inspection of inbound trains for mechanical defects. She was fully aware that this particular train consisted of tank cars containing sulfuric acid. Since it was dark during the inspection, appellant necessarily used a railroad lantern provided by CSX. During the inspection, neither appellant nor others working with her, noticed any defects in the cars being inspected. Unfortunately for appellant, a valve gasket on the top of one of the tank cars failed, without warning, spraying sulfuric acid on appellant.

After the majority of her upper body had been doused with sulfuric acid, appellant frantically removed her safety glasses and gloves, and began screaming. Hearing her screams, Timothy C. Philips, a co-worker, came to her aid. After radioing for help, other workers responded and assisted Philips by dousing appellant with water available from coolers fortuitously kept on the trains. Both Philips and

another-co-worker, Gary Hush, assisted appellant into a locomotive engine, uncoupled it from the line, and transported her to the yard office. There, Hush attempted to place appellant in a shower, but the showers failed to function. Both Hush and Philips then applied water to appellant from a nearby sink until medical units arrived.

As a result of being sprayed with sulfuric acid, appellant suffered severe burns to her scalp and hand as well as severe scarring and other related physical and psychological difficulties related to the injury.

Subsequent to the accident, the errant tank car was inspected on several occasions. Although a standard mechanical inspection revealed no defects, a later inspection of its "topside" by Hazardous Materials Manager, J.D. Casey, revealed a cracked "manway cover gasket" on the offending tank car as well as evidence of leakage in at least two other tank cars in the same line.

Numerous color photographs were taken of the defective tank car, as well as depositions and other materials gathered during discovery. These items were delivered to B.E. "Sam" Kramer, a former Railroad Specialist, and William E. Gordon, a retired Federal Railroad Administration Inspector. Both Kramer and Gordon had had extensive experience with the transportation of hazardous materials by rail. They eventually concluded that the leakage which ultimately resulted in appellant's injuries had occurred over a significant period of time, and upon proper inspection, would have been evident at the Philadelphia interchange.

Discussion

We note preliminarily that this action involves the Federal Employers Liability Ac ("FELA") 45 U.S.C. §§ 51-60. Therefore, federal law is controlling. Although purely procedural matters are governed by Maryland Rule 2-501, *see generally, Monessen S.W. Rwy.*

Co. v. Morgan, 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988), substantive issues are governed by federal law. One area that has been held to be substantive under the FELA is whether there is sufficient evidence to submit the case to a jury. *Brady v. Southern Rwy. Co.*, 320 U.S. 476 64 S.Ct. 232, 88 L.Ed. 239 (1943). Thus, while Rule 2-501 sets the standard for summary judgment, federal law establishes the guidelines for meeting that standard.

I. Summary Judgment

According to Rule 2-501(2), "the court shall enter judgment in favor of the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment." Thus, "the standard of review for a trial court's grant for a motion of summary judgment is simply whether the trial court was legally correct." *Beatty v. Trailmaster*, 330 Md. 726, 737, 625 A.2d 1005 (1993). If, however, it can be shown by the non-moving party that there is a genuine dispute as to a material fact by proffering facts which are admissible into evidence, a motion for summary judgment should not be granted. *Beatty, supra*, 330 Md. at 737. In determining whether there is a genuine dispute as to a material fact, all inferences with regard to those facts must be construed in favor of the non-moving party, even though the underlying facts may be undisputed. *Berkley v. Delia*, 287 Md. 302, 304-305, 413 A.2d 170 (1980). When considering the evidence presented by a non-moving party, the trial court must be able to draw reasonable inferences from it, because "mere metaphysical doubt as to the material facts" or the "existence of a scintilla of evidence in support of plaintiff['s] claim is insufficient to preclude a grant of summary judgment." *Beatty, supra*, 330 Md. at 738-739.

Under the FELA, if the trial court can reasonably conclude that an employer's negligence played *any* part whatsoever in the employee's injury or death, the case must be submitted to the jury. *Missouri-K.T.R. Co.*

v. Hearson, 422 F.2d 1037, 1040 (10th Cir. Kan. (1970)). Keeping this in mind, we now turn to the specific questions with which we are presented.

II.

Under the FELA, an employer must provide its employees with a reasonably safe workplace. Part of this obligation is the railroad's duty, prior to acceptance, to inspect railcars at interchanges for visible defects or other defects that would be discovered by a reasonable inspection. On discovering such defects, the railroad "must either remedy such defects or refuse to take such cards; so much at least is due from it to its employees." *Shenker v. Baltimore & Ohio Rwy. Co.*, 374 U.S. 1, 8, 83, S.Ct. 1667, 10 L.Ed.2d 709 (1963). Under the FELA, as well as at common law, unreasonable conduct in the face of a foreseeable risk of harm constitutes negligence. *Consolidated Rail Corp. v. Gottshall*, _____ U.S. _____, _____, 114 S. Ct. 2396, 129 L.Ed.2d 427 (1994). Consequently, a railroad must have actual or constructive notice that a car is defective and that it poses an unreasonable risk of harm to its employee(s). *Beeker v. Norfolk Southern Corp.*, 754 F.Supp. 1364 (N.D. Ind. 1990); *O'Hara v. Long Island R. Co.*, 532 F. Supp. 202 (E.D.N.Y. 1981).

In the case before us, whether CSX conducted a reasonable inspection, either at the Baltimore yard or at the Philadelphia interchange, is disputed. In her complaint, appellant alleges that a "reasonable" inspection would have uncovered the defect, and that the tank car would have been pulled for repairs, and her injury averted. In support of her position, appellant offered affidavits from Kramer and Gordon, both of whom, as we have said, were quite familiar with the rail industry and with the transportation of hazardous materials by rail. Both indicated that the "manway cover gasket" which ultimately failed had deteriorated over a significant period of time and was in a state of disrepair when the car passed through the Philadelphia interchange. Moreover, CSX's Hazardous Materials Manager discovered a cracked "manway

cover gasket" on the offending tank car as well as evidence of leakage in at least two other cards in the same line.[1] Accordingly, we believe appellant offered significant evidence indicating that at the time the offending tank car passed through the Philadelphia interchange, a reasonable inspection by CSX would have uncovered a patent defect posing a serious threat to its employees.

Nevertheless, CSX endeavors to establish that it had no duty to inspect the top of tank cars, citing a litany of cases pointing to a duty to conduct only an exterior inspection of the sides of the car. *See generally, Avery v. Norfolk & Western Railway Co.*, 52 F.R.D. 356 (N.D. Oh 1971); *Brewer's Adm'x v. Louisville & N.R. Co.*, 34 S.W.2d, 949 (Ky. 1931). We fail to understand why an exterior inspection does not include the top of a tank car and why a walkaround ground inspection of a tank car is synonymous with an exterior inspection. Indeed, CSX's brief acknowledges that a walkaround ground inspection would have been insufficient to detect the prior leak and defective "manway cover gasket" which ultimately led to appellant's injuries. CSX's position is paradoxical. If the probability and gravity of harm weighed against the ease of prevention is at least one measure of reasonableness, *Eaton v. Long Island Rwy. Co.*, 398 F.2d 738 (2nd Cir. N.Y., 1968), we do not understand why taking a look at the top of a tank car is difficult, particularly given its potential for harming the railroad employees. As we see it, if CSX was aware of a potential danger from the tops of tank cars carry hazardous materials and failed to conduct a topside inspection, a jury could reasonably conclude that such conduct was unreasonable, and therefore negligent. The fact that CSX and the rest of the industry have traditionally conducted only walkaround inspections is irrelevant to the question of

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[1] We disagree with CSX's characterization of the opinions contained in the affidavits of Kramer and Gordon as incompetent, illegal, or superfluous. We believe that Kramer and Gordon had sufficient experience in the field to recognize a leaking tank car, and that a "scientific" foundation for their belief is unnecessary.

what a jury could reasonably find. *Terminal Rwy. Assoc. of St. Louis v. Schorb*, 688 F.2d 361, 364 (1945).

In granting CSX's motion for summary judgment, the trial court relied principally on *Miller Mut. Ins. Assoc. of Illinois v. Southern Rwy. Co.*, 483 F.2d 1044 (4th Cir. N.C. 1973). We agree with appellant that such reliance was misplaced. Although *Miller Mut.* seems to indicate that, absent suspicious circumstances railroad company may assume a car is fit for its particular purposes and in that respect is "safe,"[2] we believe that appellant has offered ample evidence that such suspicious circumstances existed at the time the train moved through the Philadelphia interchange and that those circumstances would have been revealed had CSX only looked. According the CSX and the trial court, two "walkaround" inspections at ground level, one at the Philadelphia interchange, and the other in Baltimore, without observing defects, made further inspections unnecessary. This position assumes, of course, that ground level inspections of tank cars containing sulfuric acid were reasonable. We are not persuaded.

Finally, it is a well-settled principle of Maryland law "that the violation of a statutory regulation is evidence of negligence, and if such violation causes or contributes to the injuries complained of, it constitutes negligence." *Dennard v. Green*, 335 Md. 305, 316 (1994) (quoting *Ford v. Bradford*, 213 Md. 534, 541, 132 A.2d 488 (1957)). Moreover, "if reasonable minds would differ as to whether such violation causes or contributes to the injuries complained of, a jury question would be presented." *Dennard*, 335 Md. at 315-316, (quoting *Dean v. Redmiles*, 280 Md. 137, 161, 374 A.2d 329 (1977)). "[T]he question of whether there

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[2] The rail car at issue in *Miller* contained corn on top of unslaked lime. The reaction between the two caused a fire, destroying the corn. As a ground level inspection would not have revealed the unslaked lime which was hidden on the bottom of the car beneath the corn, nothing about the car would have alerted the carrier to the potential problem.

were violations, and if so, whether the violations were the proximate cause of the injury, [are] a question[] of fact, properly left to the jury's determination." (*Aravanis V. Eisbenberg*, 237 Md. 242 (1965).

In the present case, appellant points to several United States Department of Transportation regulations that she believes were violated by CSX, resulting in her injuries. Appellant points to 49 C.F.R. Ch 1 § 173.31(b)(3) which requires that:

> Manway covers and outlet valve caps must be made tight against leakage or vapor liquid by use of gaskets of suitable material, before cars are tendered to carrier for transportation. . All closures of opening in tank cars must be inspected to the extent practical for corrosion or damage to gasket seating surfaces and for serviceability of packing gaskets and hold down bolts. All defective packing gaskets, bolting or threaded elements must be replaced.[3]

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[3] At oral argument, appellee asserted that 49 C.F.R., Ch 1, § 173 applies only to rail shippers and *not* to rail carriers, such as CSX. We agree. The caption clearly indicates the following:

SECTION 173 - SHIPPERS - GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

Conspicuously absent from appellee's argument, however, was any reference to 49 C.F.R. Ch. 1 § 174. Its caption reads:

SECTION 174 - CARRIAGE BY RAIL

49 C.F.R., Ch 1, § 174. applies without a doubt to rail carriers and imposes upon them a statutory duty to inspect tank cars prior to acceptance at an interchange. Even without references to 49 C.F.R., § 173 does not specifically apply to shippers, 49 C.F.R., Ch 1 § 174.30 prohibits a carrier from accepting materials which are

and to 49 C.F.R. Ch 1 § 174.9 which charges that:

> [T]ank car[s] must be inspected by the carrier before acceptance. . .when received in interchange to see that [they] [are] ***not leaking***, and that the air and hand brakes, journal boxes, and trucks are in proper condition for service. (emphasis added).

Appellee asserts that appellant somehow believes that such violations impose strict liability upon CSX. We neither believe that this is appellant's position nor do we find anything in her brief to indicate otherwise. Rather, appellant simply asserts that CSX was in violation of the above referenced statute(s) and that those violations, in some measure, contributed to her injuries. We believe that a jury could reasonably find that CSX failed adequately to inspect the defective tank car at the Philadelphia interchange, and accepted it while it was leaking, proximately causing appellant's injuries.

As we have noted, in Maryland statutory violations are not conclusive of negligence, but are evidence of such. Whether CSX's inspection was reasonable under the circumstances is a question for the jury.[4] In other words, summary judgment was not properly granted. Accordingly, we will reverse the judgment of the circuit court.

"not prepared for transportation in accordance with section[]. . .173, except as provided in § 174.47(b). 49 C.F.R. Ch 1 § 174.47(b) specifically precludes a carrier from forwarding a car leaking hazardous materials to its destination. Whether or not the tank car in question was leaking in the first place is a material question which we do not believe was properly disposed of by summary judgment.

[4] We note that nowhere in appellee's brief is there a denial that CSX was in violation of United States Department of Transportation Regulations.

To be sure, we should not be construed to be charging a railroad with an absolute duty to conduct a topside inspection of all railcars, or even of tank cars. To the contrary, we are simply holding that, under the circumstances here before us, a jury could reasonably find that CSX had failed to conduct a reasonable inspection, and that its failure to do so played a part in causing appellant's injuries. Thus, summary judgment should not have been granted.

APPELLANT'S MOTION TO STRIKE APPELLEE'S BRIEF DENIED.
JUDGMENT REVERSED.

COSTS TO BE PAID BY APPELLEE.

Appendix B

Memorandum and Order of the Circuit Court for Baltimore City Granting Petitioner's Motion for Summary Judgment

TRACI L. CASTRO	*	IN THE
Plaintiff	*	CIRCUIT COURT
vs.	*	FOR
CSX TRANSPORTATION, INC.	*	BALTIMORE CITY
	*	CASE NO. 93320023/CL172650
Defendant		

* * * * * * * * *

MEMORANDUM AND ORDER

October 5, 1994

This cause came on for open court hearing on the Defendant, CSX Transportation Inc.'s (CSXT) Motion for Summary Judgment on the 19th day of August, 1994. The Plaintiff, Traci L. Castro (Castro), was represented by Walton G. Bondurant, Jr., Esquire and Robin Page West, Esquire. The Defendant was represented by Stephen Caplis, Esquire and Nancy S. Allen, Esquire.

Plaintiff, Traci L. Castro, filed her Complaint under the Federal Employers' Liability Act ("FELA"), 45 U.S. C. §51-60, against her railroad employer, CSXT.

BACKGROUND FACTS

Zinc Electolytique Dir Canada Ltee (Zinc) shipped sulfuric acid from its plant in Valleyfield, Quebec, Canada in tank cars owned by PROCOR

Limited. The tank cars were destined for Peridot Chemical Company in Baltimore, Maryland. The tank cars were transported from Quebec, Canada by Consolidated Rail Corporation (Conrail) to Philadelphia, Pennsylvania. At a railroad interchanage facility in Park Junction (Philadelphia), Defendant, CSXT, received the subject tank cars on August 25, 1993 for final transport segment to Baltimore. Thereafter, the tank cars were transported to CSXT's transport yard at Curtis Bay (Baltimore) for final switching into Peridot's side tracks.

On August 26, 1993, Plaintiff Castro, working as a road brakeperson, was part of the Defendant's three person train crew assigned to switch the tank cards in the yard onto Peridot's side tracks. Plaintiff visually inspected the tank cars for leakage and found none. Shortly thereafter, during the normal switching process and sulfuric acid sprayed from the top of one of these dome tank cars, specifically tank car PROX #13539, onto Plaintiff, without warning, as the result of a deteriorated and cracked manway cover gasket. From these resulting injuries, Plaintiff filed her Complaint against Defendant CSXT.

LEGAL DISCUSSION

The Defendant seeks Summary Judgment pursuant to Maryland Rule 2-501.

Only a "genuine dispute" as to a "material fact" is relevant in opposing a motion for summary judgment. A material fact is one which will "somehow affect the out come of the case". King v. Bankerd, 303 Md. 98 (1985). A dispute as to a fact "relating to grounds upon which the decision is not rested is not a dispute with respect to a material fact and such dispute does not prevent the entry of summary judgment". Salisbury Beauty Schools v. State Board of Cosmetologists, 268 Md. 32 (1973).

When a moving party has set forth sufficient grounds for summary judgment, the party opposing

the motion must show with "some precision" that there is a genuine dispute as to a material fact. King, 303 Md. at 112. Formal denials or general allegations are insufficient to prevent the award of summary judgment. Id., *See* Davis v. Montgomery County, 267 Md. 456 (1972).

Factual disputes that are irrelevant or unnecessary will not be counted. Anderson v. Liberty Lobby Ltd., 477 U.S. 242 (1986). When a movant has carried its burden, the party opposing summary judgment "must do more than simply show there is some metaphysical doubt as to the material facts". Matsushita Electric Industry Company Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). All of the above is quoted in Seaboard Surety v. Kline, Inc., 91 Md. App. 236 (1992).

Finally, the mere existence of a scintilla of evidence in support of Plaintiffs' claim is insufficient to preclude grant of summary judgment; there must be evidence upon which the jury (or trier of fact) could reasonably find for Plaintiff. While courts must resolve all inferences in favor of party opposing summary judgment, those inferences must be reasonable ones. Beatty v. Trailmaster, 330 Md. 726 (1993).

Against this legal backdrop, the court turns to the matter subjudice.

I.

Negligence - Failure To Conduct Top-Side Inspection

Through the myriad of legal argument, the crux of this issue can be simply stated as to whether or not CSXT, under FELA standards of negligence, was required to conduct a top-side inspection of the defective tank car at either the place of initial transfer/receipt (Philadelphia) and/or at Defendant's switching operation (Baltimore). Stated in the alternative, did CSXT have a duty to inspect the top-side of the subject tank car for signs of leakage from

defective valves that might disclose escape of the hazardous material, to wit: sulfuric acid?

> FELA, 45 U.S.C. §51 in pertinent part: Every common carrier by railroad while engaging in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . for such injury. . .resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. . .

FELA law does not depart from the general common law of negligence in that negligence may not be inferred from the mere happening of the accident. There is no presumption of negligence arising from the mere proof of injuries (citations omitted).

It is incumbent upon the Plaintiff to produce competent evidence that the railroad had actual (known) or constructive notice (suspicious circumstances) of the unsafe condition. O'Hara v. Long Island R. Co., 532 F.Supp. 202 (E.D.N.Y. 1981). The railroad's knowledge, actual or constructive, of the danger from a hazardous condition is essential to the existence of negligence. Beeker v. Norfolk Southern Corp., 754 F.Supp. 1364 (N.D. Ind. 1990). Plaintiff, Castro, does not rely on actual knowledge in her complaint or in opposition to the Defendant's Motion For Summary Judgment.

Plaintiff is therefore left to proceed under the theory of constructive notice. Constructive notice imposes a duty to inspect and a failure to conduct a reasonable inspection which would have revealed the defect.

Defendant CSXT takes the staunch position that as a general rule, a railroad that receives a car from another carrier has only a duty to conduct an inspection, an "ordinary" inspection of the exterior of the car only to look for patent, obvious or apparent defects. *See* Miller Mutual Inc. Ass'n. of Illinois v. Southern Railway Corp., 483 F2d 1044 (4th Cir. 1973); Avery v. Norfolk Western Railway Co., 52 F.R.D. 356 (N.D. Oh. 1971); Rose v. Atlantic Coast Line Railroad Company. In the case subjudice, there is no competent evidence to rebut Defendant's position (supported by deposition or affidavit including Plaintiff's own testimony under oath) that the defective top side valve was not patently obvious from a ground side walkaround inspection.

On the issue of constructive notice, Beeker v. Norfolk Southern Corp., 754 F.Supp. 1364 (N.D. Ind. 1990) is instructive: [Under FELA] the presumption prevails, even after proof of the defect, that the railway company was not aware of its existence; and until it is shown that the railway company knew, or in the exercise of ordinary care should have known, of the defect, it is not charged with that knowledge. Plaintiff, nor her co-worker Phillips, saw any obvious, patent or apparent defects in the subject railway car during their from-ground walkaround inspection just moments before the caustic spraying. Thusly, Defendant CSXT cannot be held to have had constructive notice of the defect that caused Plaintiff's injuries unless in the exercise of ordinary and reasonable care CSXT should have known of the unsafe condition.

Plaintiff seeks to impose liability upon the Defendant for failure to comply with several sections of the Department of Transportation's Hazardous Material Regulations (HAZMAT). Plaintiff relies upon the fact that the Defendant, railroad, accepted for transportation and transported by rail a shipment of hazardous materials "not prepared for transportation in accordance with parts 171, 172 and 173."

D.O.T. 49 C.F.R. §172(a);

No person may offer or accept a hazardous material for transportation in commerce unless that person complies with Sub-Part G of Part 107 of this chapter and the hazardous material is properly classed, described, packaged, marked labeled and in condition for shipment as required or authorized by this subchapter (including subsections 171.11, 171.12 and 176.11)

D.O.T. 49 C.F.R. §174.3

A shipment of a hazardous material that is not prepared for transportation in accordance with parts 171, 172, 173 of this subchapter may not be accepted for transportation or transported by rail except as provided in 174.47(b)

D.O.T. C.F.R. §173.31(b)(3)

Manway covers and outlet valve caps must be made tight against leakage of vapor liquid, by use of gaskets of suitable material, before cars are tendered to carrier for transportation . . .all closures of openings in tank cars must be inspected to the extent practical for corrosion or damage to gasket seating surface and for serviceability of packing gaskets and hold down bolts. All defective packing gaskets, bolting or threaded elements must be replaced.

D.O.T. C.F.R. §174.10(c)

. . .A shipment of hazardous materials offered by a connecting carrier must comply with this subchapter. . .

D.O.T. C.F.R. §174.9

> . . . [a tank car] . . .be inspected when received in interchange to see that it is not leaking and that the air and handbrakes, journal boxes and trunks were in proper condition for service.

Plaintiff submits the affidavits of her alleged experts B.E. "Sam" Kramer and William E. Gordon accompanied by photographs as proposed competent evidence that leakage was detectable at the point of interchange, but not by a ground visual inspection.

Defendant proffers that there are no cases holding that the railroad carrier is required to conduct a "top-side" inspection of tank cars that are transporting a hazardous material. It is however, a tenant of the law of negligence that as the danger increase so does the standard of care (citations omitted). A Defendant will be liable if he knew or should have known that the prevailing standard was insufficient to protect the plaintiff and similarly situated employees from harm. *See* Beeker, *supra*. The reasonableness of the case to be exercised by the railroad in promulgating its rules and procedures for the safety of its employees is commensurate with the hazards involved in the place where the work is to be performed. Padgett v. Southern Railway Co., 396 F.2d 303 (C.A. Tenn. 1968), Borrero v. Elgin Railway Co., 171 NE 2d 673 (1961).

The record contains photograph of the subject tank car and the topside defective manway cover. A steel rung ladder[1] runs up the side of the tank car to the top of same, at what appears to be approximately

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[1] From the record (P)laintiff's Exhibit G), "Physical Requirements for Defendant's, Brakeman/Conductor/Flagman/Switchman /Trainman/Yard Foreman employees, that reads in part; Coordination, climbs steps and ladders on cars, engines and cabooses.

2-3 feet from the defective cover. Plaintiff's expert, B.E. "Sam" Kramer, by affidavit submits that "the Defective gasket would have been readily discoverable if a topside inspection had been made by a properly trained and knowledgeable carman." The affidavit of Plaintiff expert William E. Gordon essentially concurs.

The factual scenario in the case subjudice present two relevant factors (1) that the material/substance involved is a hazardous material,[2] to wit: sulfuric acid and (2) the focus of any duty for topside inspection, if any, by the Defendant would be more so at the point of interchange (Philadelphia), not so much at the point of destination (Baltimore).

The record that exists before this court indicates that the HAZMAT regulations were in full force and effect in application to the Defendant railroad carrier's handling of the tank car filled with sulfuric acid, (apparently under pressure). It is part of the substantive law in Maryland that violation of a statute, which is a cause of plaintiff's injuries is evidence of negligence, but is not conclusive on the matter. The principle that a violation of a statute is evidence of negligence is a rule of evidence and does not create a substantive cause of action. Fisher v. O'Connors, Inc., 53 Md. App. 338 (1982).

The question of whether defendant failed to comply with a statute, and whether that failure caused or contributed to plaintiffs injuries are ordinarily left to the jury. Avavanis v. Eisenberg, 237 Md. 242 (1965). This court must, however, look at the facts and the law as a while, limited to the Federal Employers' Liability Act, subsections 51-60, (created to protect railroad employees), the HAZMAT statute, (created to protect the general public) and the laws of negligence requiring that the defendant railroad in the exercise of

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[2] As distinguished from damage to property (corn) in Miller Mutual, *supra*.

reasonable care has a duty to conduct a "reasonable" inspection.

Was the Defendant's walk around ground inspection, especially at the point of transfer, of a tank car containing a hazardous material reasonable? There can be no doubt that the Defendant was not required to conduct an internal inspection of the tank car. Nor was Defendant required to open or test the manway cover valve in the absence of exterior inspection that suggests interior defects. Avery v. Norfolk & Western Railway Company, 52 F.R.D. 356 (N.D. Oh. 1971).

The defendant is required to make a "careful superficial inspection for obvious and apparent defects. The railroad's duty is to look for defects visible or discoverable by ordinary inspection.

Defendant argues that the HAZMAT statutes place the duty for detailed inspection solely upon the shipper. This court does not read the relevant subject statutes as cited hereinbefore to be so exclusive, but does recognize 49 U.S.C. subsection 1809(1) which specifically provides that a railroad is only prohibited from knowingly or willfully accepting or transporting a tank car which the shipper, in violation of regulations did not put in proper condition.

This court would not require the defendant to conduct a mechanical inspection of the closure mechanism to check for a worn gasket. Is it, however, unreasonable to expect a railroad carrier in the exercise of reasonable care to conduct a topside inspection at the point of exchange of a tank car containing a hazardous material, looking for visual evidence of leakage when the main valve for the ingress or egress (by vaporize escape) is located atop the tank car? Knowledge of defects which could have been discovered by a "reasonable" inspection will be imputed to the defendant (alas, constructive notice).

Based on all the aforegoing facts and discussion, this court returns to the law. Again, Plaintiff brings

her cause of action pursuant to the FELA. FELA law controls. The FELA negligence standards requires either actual or constructive knowledge of the defect. Miller Mutual, *supra*, is instructive and persuasive on the issue of constructive notice at page 1047"... we conclude that the trial judge erred in submitting the question of Central Soya's negligence to the jury. The record contained no evidence that Central Soya had actual knowledge that car 96398 contained residual deposits of unslaked time. Nor do we find any evidence that would support a finding of constructive knowledge, i.e., that the circumstances are such that it is fair to impute to Central Soya knowledge it did not have . . . Central Soya was entitled in the absence of suspicious circumstances, to assume that the car was suitable for hauling grain. There was nothing about the exterior appearance of the car to suggest that it contained a dangerously incompatible substance. Continuing on page 1048, . . ."Even if we assume arguendo that Central Soya had a duty to inspect the car in the absence of suspicious circumstances, we believe its employees sufficiently discharged the duties. Central Soya's employees made a visual inspection . . .We think this was all they could be expected to do without special facilities".[3] (Emphasis added).

Argue as Plaintiff does, by affidavit or otherwise, she can point to (1) no facts from the record that indicate that at the point of interchange or just prior to the injuries complained of, that suspicious circumstances existed that put Defendant CSXT on notice that a dangerous condition existed or might have existed nor (2) any law that requires a "top-side inspection" for evidence of leaks in the absence of suspicious circumstances.

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[3] The record in this case discloses no special facilities of Defendant, CSXT, e.g. special overhead scaffolding or tunnel for overhead inspection of a railroad tank car.

The tank car was inspected twice in the same manner, once in Philadelphia and again by Plaintiff in Baltimore. No genuine dispute as to a material fact exist as to the reasonableness of the inspection in the absence of suspicious circumstances. Defendant's Motion for Summary Judgment will be granted.

II.

Negligence - Inadequate Overhead Lighting

Plaintiff relies on Schiller v. Penn Central Transportation Co., 509 F.2d 263 (6th Cir. 1975). Schiller slipped under a rail car while working in a General Motors Corporation (GM) rail and truck yard where steel was delivered and stored for processing. The ground area was slick with oil and the lighting under the control of GM was poor. Unlike the Plaintiff in Shiller, the Plaintiff, subjudice Castro, cannot and has not established in the response to Defendant's Motion for Summary Judgment, proof that inadequate lighting prohibited her from safely performing her job, that any prior notice had been provided defendant CSXT regarding inadequate lighting or that inadequate lighting caused or contributed to her injuries. Maryland Rule 2-501(b) requires that in a party's response to a motion for summary judgment, the responding party. . . may not rest solely upon the allegations contained in the pleadings, but shall support the response by an affidavit or other written statement under oath. In Plaintiff's response she simply quotes from her deposition that, "if I could have seen better I might have been able to know there was acid and "there was no lighting where I was at."

The accident complained of is not causally connected to the sudden and unexpected spraying of sulfuric acid from atop a tank car and any lack of lighting. Neither Plaintiff nor her experts allege in statements under oath[4] that had there been better

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[4] Affiant, Gary Hush (Plaintiff's co-worker), states that other parts of the Curtis Bay yard have better lighting than the area in which the Plaintiff was injured. This fact however is neither

lighting this incident may have been averted from the facts.

Albeit, Plaintiff never addresses in her Response the required elements for negligence involving any factual basis that the lighting was inadequate for her to perform her duties as a yard brakeperson, notice thereof to Defendant CSXT or causal relationship.

Plaintiff cannot survive Defendant's Motion For Summary Judgment on this theory of liability.

III.

Negligence - Inadequate Training and Warnings

At the time of the accident, Plaintiff Castro was performing her duties, as trained. Plaintiff was simply walking past a tank car (that she had previously inspected in passing) when she was suddenly and unexpectedly sprayed from above with sulfuric acid. Plaintiff rebuts Defendant CSXT's Motion For Summary Judgment with no specifics under oath as to what training she was not given that would have avoided the accident. While in the performance of one's employment duties and being in the consequential wrong place at the wrong time does not give rise to cause of action for inadequate training. Plaintiff's responsive memorandum's reference to not being trained as a brakeperson to inspect the top of railroad cars is not relevant in light of the court's ruling in Part I herein; finding that Defendant, CSXT, has no duty to perform top-side inspections of tank cars.

Unlike the Plaintiff in Phillips v. Chesapeake and Ohio Railway Co., 475 F.2d 22 (4th Cir. 1973) who tried to stop a moving railroad car by placing a 2x4 under the wheels and that failing, was ordered by the conductor to board the still moving car. He

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substantive or inferential fact that is legally sufficient to support the proposition that better lighting would have averted Plaintiff's injury.

subsequently was injured when he jumped from same when a collision appeared imminent. Plaintiff Castro's conduct herein, was passive as compared to active and she had been employer on the job much longer than Phillip's 4 days of training.

Plaintiff has not come forward with any specific evidence that inadequate training caused her to improperly perform her duties and thus her injuries resulted. Her deposition taken as a whole indicates that as far as she knew (and her co-workers) that at the time of the accident she was in fact properly performing her duties as previously trained and previously performed. Plaintiff testified that she knew and was trained that if she saw any leakage, she was to report the problem. The tank car was clearly and plainly marked at the time as containing sulfuric acid. She was reminded of this need for vigilant surveillance and reporting by her co-worker, Phillips, on the site prior to the accident. Plaintiff never saw leakage before the sudden spraying.

As to Plaintiffs allegation of failure to warn, the Plaintiff takes this position from her Response In Opposition To Defendant CSX Transportation, Inc.'s Motion for Summary Judgment at page 19, ". . . the Railroad should have stopped the movement of the train, notified the Plaintiff and her crew of the dangers and removed the car." This conclusion by Plaintiff is based on the assertions ruled upon by this court in Part I, *supra*, wherein, the court found that Defendant had no reason to know of the dangerous condition and thusly it follows that Defendant has no duty to warn the Plaintiff. Plaintiff cannot survive the Defendant's Motion For Summary Judgment on causes of action for negligence regarding inadequate training and/or failure to warn.

IV.

Negligence - Failure To Provide Goggles and Different Gloves Instead of the Safety Glasses and Gloves Plaintiff was Wearing

As to the glasses, there is no evidence that goggles, as opposed to safety glasses were required for Plaintiffs job performance at the time of the spraying. Nor is there any expert testimony by affidavit or other statements under oath that "goggles" were required for the performance of her brakeperson duties or that goggles would have prevented the burning sensations[5] in Plaintiff's eyes. The court deems that at a minimum such is required in response to Defendant's Motion For Summary Judgment.

It is noteworthy that although Plaintiff alleges in her responsive memorandum, at page 23, that Federal regulation required Defendant, railroad, to provide Plaintiff with gloves which were suitable to protect her from acid exposure, neither the Defendant nor the court can find any such requirement in the record before the court at the time of this ruling.

Finally, on this point of gloves, it is a fact that Plaintiff was wearing gloves at the time of the incident. Plaintiff claims the gloves provided by Defendant were too big (being men's gloves) and she purchased her own. She was wearing these gloves at the time of the incident. Plaintiff was splashed with acid[6] among other places on her right hand. Plaintiff immediately threw off her gloves.

There is no evidence in the record that gloves of any different type regardless of who provided them, if required by Federal regulation, would have prevented Plaintiff's injuries on their extent and duration. There being no genuine dispute as to material fact on this cause of action, Defendant's Motion For Summary Judgment will be granted.

V.

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[5] There are no allegations of permanent injuries to Plaintiff's eyes.

[6] See Plaintiff's Deposition page 68 line 6 through page 69, line 17. (Exhibit A).

Negligence - Breach of Duty to Provide Medical Equipment, Supplies and Training to its Employees

On this issue, neither Plaintiff nor Defendant have cited any authority to support their various positions. Plaintiff alleges and rests upon "what should have been" while Defendant asserts that Defendant's train crew (inclusive Plaintiff's co-workers) at the site of the caustic spraying acted properly, repeatedly dousing Plaintiff with water. Noteworthy, is Plaintiff's deposition testimony at pages 84 Line 4 through page 85 line 19:

Q. Has any doctor told you that any of your wounds would have been different had there been a working shower at the railroad?

A. Yes.

Q. Who told you that?

A. Several of the doctors. Apparently, for sulfuric acid the thing that is the treatment is water, to be irrigated, to be flushed with water continuously. If I had been flushed with water immediately then my burns would not be as severe just because the acid would have been washed. Whereas, since the acid was not irrigated it continued to burn my skin. It's not like a thermal burn where it goes out, but it continues to eat your tissue. I was told that electrical burns and chemical burns are more severe and cause greater damage than thermal burns.

Q. Which doctor apportions any part of your injuries to the lack of showers?

A. I think Dr. Shermack, who was the admitting physician, and the nurses.

Q. At the hospital"

A. Yes. And I'm sure they would all say the same thing. You can ask them. Probably Dr. Leslie Wong; Dr. DeCarlo; my current plastic surgeon, Dr. Bruce.

Q. Do they say how much worse -- did they give you any kind of number?

A. I don't know that I asked how much worse. He might be able to tell you. The difference is on my face, for instance, that's the place that was given a lot of attention from the water from my co-workers, whereas, the rest of me wasn't given as much because there's no way to be continuously irrigated, and I could only place that towel on my face, not on all of my body at the same time, so that's why my face is a lot different than the rest of my body. The burns have healed better.

This testimony is hearsay and not competent for purposes of this proceeding subjudice[7] or trial on the merits.

Plaintiff has not been able to submit "competent" testimony on the issue to establish that more immediate and continuous irrigation by water (i.e., showers at the yard site) over those portions of her body exposed to sulfuric acid would have resulted in a diminishment of her injuries.[8] Plaintiff has not been

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[7] In order to defeat a motion for summary judgment, the opposing party must proffer material facts which would be admissible in evidence. Seaboard Surety v. Kline, Inc., 91 Md. App. 236 (1992), Shaffer v. Lohr, 264 Md. 397 (1972). Mere allegations which do not show facts in detail with precision are insufficient to prevent summary judgment. Beatty v. Trailmaster, 330 Md. 726 (1993), Gooch v. Maryland Mechanical, 181 Md. App. 376 (1990).

[8] Plaintiff's Exhibit K, Affidavit of treating physician Dr. Eve Bruce, M.D. does not satisfy any legal conclusions for opinion based on reasonable degrees of medical probability or certainty that would be admissible as evidence. Dr. Bruce speaks in terms

able to establish negligence in the deprivation under this cause of action.

Sulfuric acid is an inherently dangerous material. Defendant is in the business of transporting commodities and substances, including sulfuric acid which is generally known to be caustic.

As in Schiller, Id., two or more negligent acts may work together to cause an injury. There may be more than one cause of an injury. That is several negligent acts may work together. Each person (or party) whose negligent act is a cause of an injury is responsible.

Gary Hush, the locomotive engineer and Plaintiff's co-worker on the night of the incident, submits by affidavit (Exhibit D) that he is aware of four (4) other "incidents" having occurred since the late 1970's or early 1980's, but no incident during his twenty six (26) years of employment involving an incident like Plaintiff's involving injuries from sulfuric acid sprayed from a tank car (emphasis added). Hush, went on to say in the same affidavit that he cannot say that he could have used any items, with which to treat Plaintiff, that may have been contained in a (emergency medical)kit. This testimony under oath hardly raises the spectra of foreseeability.

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of "is more effective," not that it would have been and "would have been helpful," not that it would have been productive in diminishing or alleviating any or some of Plaintiff's injuries. See also footnote 7, above.

The opinion of an expert must be based on facts, proved or assumed, sufficient to form a basis for an opinion, and cannot be invoked to supply the substantial facts necessary to support such conclusion. The facts upon which an expert bases his opinion must permit reasonably accurate conclusions as distinguished from mere conjecture or guess. Beatty, *supra*; Marshall v. Sellers, 188 Md. 508 (1946).

Foreseeability as an element of proximate cause does not require that the defendant must have foreseen the injury in the exact form in which it occurred, but requires only that in the exercise of reasonable care the defendant or defendants might have foreseen that some injury would result from his acts or omissions or that consequences of general injurious nature might have been expected Miller Mutual Insurance Association of Illinois v. Southern Railway Corp., 483 F.2d 1044, 1049 (4th Cir. 1973).

As previously discussed, Plaintiff has failed to show, that Defendant CSXT should have foreseen that its transportation of the subject tank car would have spawn any harmful consequences. The FELA imposes upon a railroad the duty to provide its employees with a safe workplace, tools and equipment. There are no genuine disputes as to a material fact as to any duty that the Defendant has breached relevant to this cause of action.

ORDER

For the aforegoing reasons it is the 5th day of October, 1994 ORDERED by the Circuit Court for Baltimore City that Defendant, CSXT's Motion For Summary Judgment is GRANTED and judgment is hereby entered for Defendant CSXT.

Judge Clifton J. Gordy
CLIFTON J. GORDY
JUDGE

cc: Robin Page West, Esquire
Walton G. Bondurant, Jr., Esquire
Stephen B. Caplis, Esquire
Nancy S. Allen, Esquire

Appendix C

Order of the Court of Appeals of Maryland Denying Petition for Certiorari to the Court of Special Appeals

CSX TRANSPORTATION, INC.	*	**In the**
	*	**Court of Appeals**
v.	*	**of Maryland**
TRACI L. CASTRO	*	**Petition Docket No. 511, Sept. Term 1995**
	*	**(No. 1867, Sept. Term 1994, Court of**
	*	**Special Appeals)**

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be and is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

s/ ROBERT C. MURPHY
Chief Judge

Date: January 18, 1996

Appendix D

Affidavit of William E. Gordon

TRACI L. CASTRO	*	IN THE
Plaintiff	*	CIRCUIT COURT
vs.	*	FOR
CSX TRANSPORTATION, INC.	*	BALTIMORE CITY
	*	CASE NO. 93320023/CL172650
Defendant		

* * * * * * * * *

AFFIDAVIT

State of Mississippi
City/County of Pearl River

This date personally appeared before me, a Notary Public in and for the City and State aforesaid, William E. Gordon, who after being first duly sworn, did depose and say:

1. That the affiant's name is William E. Gordon and his address is 7 Palm Drive, Carriere, Mississippi.

2. That the affiant is an adult citizen of the State of Mississippi.

3. That the affiant has personal knowledge of and is competent to testify as to the matters stated herein.

4. That the affiant has been hired by the firm of Miller & Bondurant, Ltd. to consult in the matter of Traci L. Castro v. CSX Transportation, Inc. as filed in the Circuit Court for the City of Baltimore.

5. That the affiant has substantial experience in the area of railroad safety and operations in the area of hazardous materials, as reflected on the attached resume, and has been qualified as an expert in the area railroad transportation of hazardous materials, operations and safety.

6. That the affiant has read the deposition of Traci L. Castro taken February 22, 1994, the deposition of Traci L. Castro taken February 22, 1994, the various documents produced to the Plaintiff in the matter, including the FRA Hazardous Incident Report filed with FRA and signed by Edward G. Cook, Senior Manger, CSX Transportation, Inc., photographs which were provided in response to Plaintiff's Interrogatory number 2, such response dated December 17, 1993, and identified as those photographs taken of the subject rail car at issue taken August 26, 1993 by John McCarthy, and the Affidavit of William C. Benson dated January 20, 1994.

7. Based upon the above-described information, affiant is ready and willing to give the following preliminary expert opinions about which affiant is also willing to testify at the trial of this matter.

(a) The gasket identified by the FRA incident report form signed by Edward G. Cook and depicted in the above-mentioned photographs is in a grossly

deteriorated condition insufficient for the purpose for which it was designed.

(b) That the deterioration of the subject gasket was such that it must have been in that condition prior to August 25, 1993, the date that affiant William C. Benson identifies as the date on which the car was interchanged to CSX Transportation, Inc. in Park Junction, Philadelphia, Pennsylvania.

(c) That the deterioration around the cover was sufficient to indicate that the leakage had existed for a period of time prior to the above-mentioned date.

(d) That CSX Transportation, Inc. was in violation of the D.O.T. 49 C.F.R. §174.3 in accepting a tank car not prepared for transportation in accordance with D.O.T. 49 C.F.R., §§171, 172 and 173.

(e) That CSX Transportation, Inc. was in violation of D.O.T. 49 C.F.R. § 174.9 in that it accepted at an interchange point a tank car containing hazardous material without ensuring that it was not leaking.

(f) that CSX Transportation, Inc. was in violation of D.O.T. 49 C.F.R. § 171.2 in that it accepted a tank car carrying hazardous material not in compliance with the applicable D.O.T. regulations

and that the hazardous material was not properly packaged and in a condition for shipment as required and authorized by the applicable rules and regulations.

(g) Further, that CSX Transportation, Inc. was in violation of D.O.T. 49 C.F.R. § 171.2(b) in that CSX Transportation, Inc. transported hazardous materials in interstate commerce which did not comply with the applicable D.O.T. rules and regulations.

(h) Affiant opines that a visual inspection from the ground at interchange is grossly insufficient to ensure that tank cars carrying hazardous materials are not leaking.

(i) Affiant further opines that the only way in which a visual inspection from the ground would detect a leak would only be in the occasion that there was a massive leak of large proportions for in excess of the degree of leaking which could cause substantial threat of bodily injury or death to railroad employees and others.

(j) Affiant opines that a proper inspection of a tank car carrying hazardous materials must necessarily entail a top-side inspection to ensure safety, including the quick-fill covers and other

safety devices on the top of a tank car to ensure that there are no signs of leakage and further to ensure that the car is in conformance with applicable D.O.T. regulations for the safe movement of hazardous materials.

(k) Affiant further opines that a proper top-side inspection of the car depicted in the above-mentioned photographs would have exposed the leaking and badly deteriorated gasket in the subject card of this suit.

And further this affiant says not.

s/ William E. Gordon

Subscribed and sworn before me this 30th day of June, 1994.

s/ Luann Watkins
Notary Public

My commission expires: 2-7-95

Appendix E

Affidavit of B.E. "Sam" Kramer

TRACI L. CASTRO	*	IN THE
Plaintiff	*	CIRCUIT COURT
vs.	*	FOR
CSX TRANSPORTATION, INC.	*	BALTIMORE CITY
	*	CASE NO. 93320023/CL172650
Defendant		

* * * * * * * * *

AFFIDAVIT

This date personally appeared before me, a Notary Public in and for the County of Pima, State of Arizona, B.E. "SAM" KRAMER, who being first duly sworn, did depose and say:

1. That the affiant's name is B.E. "Sam" Kramer and his business his business address is 8230 East Broadway, Suite W-6, Tucson, Arizona 85710.

2. That the affiant is an adult citizen of the State of Arizona.

3. That the affiant has personal knowledge of and competent to testify to matters stated herein.

4. That the affiant has been retained by the firm of Miller & Bondurant, Ltd., to consult in the matter of Traci L. Castro vs CSX Transportation, Inc., as filed in the Circuit Court for the City of Baltimore.

5. That affiant has substantial experience in the area of railroad safety and operations in the area of hazardous materials, as reflected in Attachments 1 and 2; and the affiant has further been qualified as an expert in operations and safety in the transportation of hazardous materials by rail.

6. That the affiant has reviewed various documents produced to the Plaintiff in this matter, including the following: CSX Employee's Report of Personal Injury, Interrogatories and Answers, Complaint and Election for Jury Trial, statements crew involved, CSX Personal Injury/Occupational Illness Report, The Official Railway Equipment Register, CSX Mechanical Inspection Report for the subject freight car, Industry Code Track List, Material Safety Data Sheet-Sulfuric Acid H_2SO_4, photocopies of eighteen photographs of the Plaintiff, CSX Transportation's Memorandum in Support of Its Motion for Summary Judgment, Affidavit of William C. Benson, U.S. Department of Transportation (DOT) Hazardous Materials Incident Report filed by Edward G. Cook (Senior Manager, CSX

Transportation, Inc.), and 35 color photographs (31/2 " X 5") taken by John McCarthy on August 26, 1993.

7. That, based on affiant's review of the above-listed documents, affiant states the following preliminary expert opinions:

(a) Description of Events portion of the US/DOT Hazardous Materials Incident Report signed by Edward G. Cook states that J.D. Casey (CSXT Hazardous Materials Manager) found the subject tank car, PROX 13539 had a badly deteriorated and cracked manway cover gasket, which is visible in the photos cited in Item 6 above. The condition of the gasket prevented it from functioning as a seal, for which it was designed and applied to the manway.

(b) The deterioration of the gasket occurred over a period of time and, therefore, was in a deteriorated condition when the car went through interchange in Park Junction, Philadelphia, Pennsylvania.

(c) Acid reaction on the tank car on top around dome/manway, on the manway cover, and on related components, as depicted in the photos cited in Item 6 above, indicates leakage had been ongoing over a period of time.

(d) CSX Transportation, Inc., was in violation of DOT 49 CFR §174.3, in that it

accepted in interchange a tank car containing hazardous material that was not properly prepared for transportation in accordance with DOT 49 CFR §173.31, part (b), sections (1) and (3).

(e) CSX Transportation, Inc., was in violation of DOT 49 CFR §174.9 by accepting in interchange a tank car containing hazardous material without inspecting the car to ensure that it was not leaking.

(f) CSX Transportation, Inc., was in violation of DOT 49 CFR §171.2(a) by accepting a tank car carrying hazardous material that was not in compliance with the applicable DOT regulations requiring the material to be properly packaged and in proper condition for shipment.

(g) CSX Transportation, Inc., was also in violation of DOT 49 CFR §171.2(b) by transporting hazardous materials in interstate commerce which did not comply with DOT rules and regulations.

(h) Ground-level visual inspection of tank car domes and related components is totally insufficient to detect leaks or to fulfill inspection requirements for tank cars carrying hazardous materials at interchange points.

(i) The only way a tank car dome leak could be detected from ground level, would be if the leak was large enough to run down the sides of the tank car. However, exposure to even small quantities of hazardous materials can cause bodily injury to railway employees or to others who might come in contact with leaking railroad cars.

(j) To conduct a proper inspection of tankcars carrying hazardous materials as required at interchange points, it is imperative that the inspector make a topside inspection of the dome and all the related components to ensure that the car is free of leaks and in compliance with applicable rules and DOT regulations for the safe movement of hazardous materials.

(k) Photos cited in Item 6 clearly show the defective gasket that would have been readily discovered if a topside inspection had been made by a properly trained and knowledgeable carman.

(l) CSX Transportation, Inc., was in violation of the following Interchange Rules of the Association of American Railroads (AAR):

"Rule 1 - Care of Freight Cars, 1. Inspection,
(a) Each railroad is responsible for the condition of all cars on its line.

(b) Tank cars must be inspected for leakage before acceptance for shipment.

"Rule 88, part 26, section (a) Tank cars (empty or loaded) will not be accepted in interchange unless they comply with the AAR Specifications for Tank Cars and DOT Regulations - Section (c) Tank cars must have the following parts properly secured in place and equipped with chain or other type of securement, (1) Dome covers (chained or hinged), (2) Outlet reducers, (3) Outlet valve caps."

FURTHER THIS AFFIANT SAYS NOT.

s/ B.E. Sam Kramer
B.E. "Sam" Kramer

State of Arizona)
)
County of Pima)

Subscribed and sworn before me this 28th day of June, 1994.

s/ Valerie Seelos

My Commission expires: My Commission Expires Feb. 14, 1996

Appendix F

Excerpt from 1991 Federal Railroad Administration Hazardous Materials Enforcement Manual

Culpability is also very low where the violation is discovered on the property of one company that has not had a reasonable opportunity to correct it but the violation was clearly more attributable to another company. For example, this may be true with regard to an equipment defect where the receiving railroad has hauled the car only a short distance from interchange to a major repair point and FRA is confident--based on its experience at that location--that the violation would have been caught and corrected by the receiving railroad even had the FRA not been present. There, the better candidate for enforcement action would be the delivering railroad if the evidence indicated that the defect was present when that railroad delivered the car. Likewise, where a placarded tank car is found on railroad property with loose fittings that could not be observed from the ground and with no evidence of a leak, the culpable party is nearly always the car's offeror. It is the offeror that has the primary responsibility to ensure that all closures on a car are secured in such a manner as to remain secured under conditions normally incident to transportation. To get at the root cause of the problem, the violation should be taken against the offeror (unless there is some evidence of vandalism or extremely rough handling since the car left the offeror).

Supreme Court, U.S.
FILED
APR 19 1996
CLERK

No. 95-01584

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

CSX TRANSPORTATION, INC.

Petitioner

v.

TRACI L. CASTRO

Respondent

On Petition for Writ Of Certiorari
To The Court of Special Appeals Of Maryland

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Walton G. Bondurant, Jr.
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QUESTIONS PRESENTED FOR REVIEW

1. Whether, at summary judgement motion, Castro offered sufficient evidence that Petitioner failed to exercise reasonable care in the inspection of tank cars containing hazardous materials.

2. Whether, when reviewing Petitioner's summary judgement motion, the Maryland Court of Special Appeals correctly applied Federal FELA substantive law requiring Petitioner to exercise reasonable care for the safety of its employees when inspecting railroad cars containing hazardous materials at interchange.

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No. 95-01584

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

CSX TRANSPORTATION, INC.

Petitioner

v.

TRACI L. CASTRO

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Tracy L. Castro, respectfully prays that the Petitioner's motion for a writ of certiorari be denied as to the judgement and opinion of the Court of Special Appeals of Maryland denying Petitioner's motion for summary judgement entered in this action on September 26, 1995.

STATEMENT OF FACTS

Castro adopts the Court of Special Appeals of Maryland's background facts. See Opinion of the Court of Special Appeals, *Pet. for Writ of Cert.* 2a-3a.

ARGUMENT

I. INTRODUCTION

In an attempt to get the attention of this Court, Petitioner has attempted to take this straightforward FELA case and turn it into an issue of major social and economic importance. The thrust of Petitioner's argument is that the Federal Railroad Administration and the Department of Transportation, in promulgating regulations for the transportation of hazardous materials, have somehow preempted the Federal Employers' Liability Act, thereby precluding Castro from recovering under the FELA for an on-the-job injury. The allegation that a federal regulatory administrative agency has the power to repeal an Act of Congress, as interpreted by this Court, is without merit. Petitioner has, in error, cited cases where state common law tort actions have been pre-empted. However, the procedural setting of this case is one of a state court applying federal law to a federal cause of action -- specifically, a Federal Employer's Liability Act claim.

Despite Petitioner's attempts to metamorphosize this purely summary judgment/factual issue into the imposition of an absolute duty to perform a specific type of inspection, the true issue is whether the lower court correctly applied federal law to find that Castro had met her burden to avoid summary judgment as a matter of law. In answer to this question, the Court of Special Appeals of Maryland (hereafter, "Appellate Court") simply held that "a jury could reasonably find that CSX had failed to conduct a reasonable inspection, thus summary judgment was improperly granted for the defendant." *Pet. for Writ of Cert. at 9a.*

The Federal Employers' Liability Act, originally enacted in 1906, continues to exist as a railroad worker's sole source of compensation for an on-the-job injury. The

only purpose for this appeal by Petitioner is to further delay the compensation Traci L. Castro needs and deserves.

II. THE COURT OF SPECIAL APPEALS DID NOT ERR IN HOLDING THAT TRACI CASTRO HAD MET HER BURDEN TO CREATE A JURY ISSUE AS TO THE REASONABLENESS OF CSX'S INSPECTION OF ACID FILLED RAILROAD CARS.

The Petitioner continues to rely heavily upon Millers Mut. Ins. Assoc. of Illinois v. Southern Rwy. Co., 483 F.2d 1044 (4th Cir. N.C. 1973). However, as the Appellate Court correctly held, such reliance is clearly misplaced.[1]

The binding authority on the Appellate Court was this Court's decision in Shenker v. Baltimore & Ohio Rwy. Co., 374 U.S. 1 (1963). Shenker is similar to the case at bar in that the Railroad had accepted at interchange a defective car from another railroad that eventually caused injury to an employee of the receiving Railroad. In Shenker, the Railroad urged that it had no prior notice of the defect on the car and it had no duty to perform an inspection at interchange to ensure that the car was safe. This Court rejected that contention, finding that, under the FELA, a railroad has an absolute and non-delegable duty to exercise reasonable care for the safety of its employees, including performing reasonable inspections of railroad cars accepted at interchange.

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[1] This Fourth Circuit opinion discusses a shipper's duty under North Carolina common law to inspect a rail car provided by a railroad. Millers was not an FELA case, applied state not federal law, and is in direct contradiction to this Court's interpretation of a Railroad's duty under the FELA. See Shenker v. Baltimore & Ohio Rwy. Co., 374 U.S. 1 (1963).

The Petitioner here similarly urges that it had no duty to inspect the subject defective acid car due to federal regulation. The Court of Appeals noted the fatal flaw in such an argument, remarking: "We fail to understand why an exterior inspection does not include the top of a tank car and why a walk around ground inspection of a tank car is synonymous with an exterior inspection...CSX's position is paradoxical." *Pet. for Writ of Cert. at 6a.*

The Appellate Court simply applied the correct legal standard to the factual situation at bar and found that the plaintiff had adduced sufficient evidence to avoid summary judgement.

The Petitioner's persistent urging that this Court should adopt as a matter of law the procedure by which railroads shall heretofore inspect hazardous material cars at interchange, thereby precluding injured workers from recovering under the FELA thereafter, would do exactly what the Petitioner so persistently urges the Appellate Court has done -- it would impose a Court created standard of care when the FELA requires reasonable care under the circumstances.

The FELA allows concurrent jurisdiction of suits arising thereunder in both federal and state courts. (45 U.S.C. § 56). Despite the fact that an FELA suit may be brought in the state court, the state court is still bound by federal substantive law and federal interpretation of the FELA. Norfolk & W. Rwy. Co. v. Liepelt, 444 U.S. 490 (1980). Thus, the Appellate Court has created no new "version of FELA common law--[casting off] years of settled federal case law" as urged by the Petitioner. *Pet. for Writ of Cert. at 9.* The Appellate Court, in holding that the Petitioner had a non-delegable duty of reasonable care to inspect railroad cars at interchange, and will be held liable to their employees for injuries caused by its failure to

exercise such care, is in accord with this Courts interpretation of the FELA.

The Petitioner's misunderstanding of the procedural setting of this case is further exemplified by reliance upon CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993). Easterwood involves federal preemption of state tort claims for injuries arising as a result of a railroad's compliance with federal regulation. Easterwood, and other cases cited by Petitioner, simply stand for the proposition that when federal law is in conflict with state law, including common law causes of action, the federal law must prevail. These cases have no application whatsoever to the federal cause of action at issue in this matter. It is axiomatic that a regulatory agency does not have the power to repeal an Act of Congress. Therefore, Acts of Congress, as interpreted by this Court, take precedence over regulations promulgated by a Federal Regulatory Agency. The FELA imposes a duty to exercise reasonable care for the safety of Petitioner's employees. No regulation or manual[2] of the Department of Transportation or the Federal Railway Administration can repeal this Act.

While federal regulations cannot preempt an Act of Congress, such regulations are evidence of the standard of care expected of employers.[3] However, the fact that the

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[2] Petitioner relies heavily on inspection manuals as if such materials were legal authority.

[3] The Petitioner continues to argue that the Castro's experts have relied on "erroneous conclusory opinions of law." Laws and regulations are relevant to the standard of care to be exercised by a Railroad under the FELA. Experts, retained to testify on the Petitioner's deviation from that standard, must use such laws and regulations as a basis of their opinion to the extent that they are relevant.

regulations are evidence of the standard of care does not make them determinative of the standard of care under FELA. Case-law is consistent in this regard, and no clarification is required. See Earwood v. Norfolk Southern Railway Company, 845 F.Supp. 880 (N.D. Ga. 1993)(the court rejected a defendant railroad's claim that the Federal Railroad Safety Act precluded a conductors FELA claim); Failing v. Burlington Northern Railroad Company, 815 P.2d 974 (Colo. Ct. App. 1991); and see Albrecht v. Baltimore & Ohio Rwy., 808 F.2d 329 (4th Cir. 1987) (In an FELA case, "regulations promulgated under OSHA provide evidence of the standard of care exacted of employers, but they neither create an implied cause of action nor establish negligence per se.", at 332).

CONCLUSION

Whether the Petitioner exercised reasonable care for the safety of Traci Castro is a matter of fact to be determined at the trial level. The FELA, as interpreted by this Court, imposes a duty of reasonable care upon railroads for the safety of their employees. As the Appellate Court correctly found, Castro produced sufficient evidence that a reasonable jury, with all inferences resolved in her favor, could find that she was injured by Petitioner's failure to exercise reasonable care under the circumstances, and for the foregoing, the Respondent respectfully prays that Petitioner's request for a writ of certiorari be denied.

This the 19th. day of April, 1996.

Respectfully submitted,

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